No. 76-403

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT MAXWELL FENLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. _____

ROBERT MAXWELL FENLON,

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Robert Maxwell Fenlon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered June 7, 1976.

OPINION BELOW

On June 7, 1976, the Court of Appeals entered its opinion affirming the conviction of petitioner for willfully and knowingly encouraging and inducing, and attempting to encourage and induce, the entry into the United States of an alien, who was not lawfully entitled to enter and reside within the United States in violation of 8 U.S.C., Section 1324(a) (4). Petition for rehearing was denied on August 20, 1976. A copy of the opinion, which has not been officially reported, is attached as Appendix A. A copy of the Order denying petition for rehearing is attached as Appendix B.

JURISDICTION

On June 7, 1976, the Court of Appeals entered judgment affirming the conviction of petitioner for willfully and

knowingly encouraging and inducing, and attempting to encourage and induce, the entry into the United States of an alien who was not lawfully entitled to enter and reside within the United States. (App. A) Petition for rehearing was denied on August 20, 1976. (App. B) Jurisdiction to review the judgment of the Court of Appeals is conferred upon this court by Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court adequately complied with Rule 11, Fed. R. Crim. P. at the time petitioner's plea of guilty was entered.

2. Whether the District Court abused its discretion in denying petitioner's motion to withdraw his plea of guilty.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be ... deprived of life, liberty or property without due process of law; ....

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him; ....

STATUTORY PROVISIONS INVOLVED

Title 8, United States Code, Section 1324(a) (4):

> (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who-
>
> (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of - any alien ... not duly admitted by an Immigration Officer or not lawfully entitled to enter or reside within the United States ... ; shall be guilty of a felony ....

Rule 11, Federal Rules of Criminal Procedure.

> (c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) The nature of the charge to which the plea is offered, ...

STATEMENT OF THE CASE

On September 19, 1975, petitioner entered a plea of guilty to Count V of an indictment containing nineteen counts. (C.R.71)[1/] (R.T.I)[2/] Count V alleged a violation of Title 8, U.S.C., Section 1324(a) (4). (C.R.6)[3/]

1/ "C.R." refers to the Clerk's Record on appeal.

2/ "R.T.I" refers to the Reporter's Transcript of the proceedings on September 19, 1975, when petitioner entered his plea of guilty.

3/ Count V of the indictment reads as follows:

> On or about July 31, 1975, defendant, Robert Maxwell Fenlon, willfully and knowingly encouraged and

On November 17, 1975, petitioner filed a motion to withdraw the plea of guilty entered on September 19, 1975. (R.T.II)[4/] On December 3, 1975, petitioner's motion to withdraw his plea of guilty was heard before the Honorable Gordon Thompson, Jr., District Court Judge. (R.T.III) [5/]

---

induced, and attempted to encourage and induce the entry into the United States at San Ysidro, California, within the Southern District of California, from Mexico, of Blanca Estela Ramos-Farrel, an alien who was not lawfully entitled to enter and reside within the United States and thereafter, said defendant was first found in the Southern District of California in violation of Title 8, United States Code, Section 1324(a) (4).

4/ "R.T.II" refers to the Reporter's Transcript of the proceedings on November 17, 1975, when petitioner filed his motion to withdraw the plea of guilty entered.

5/ "R.T.III" refers to the Reporter's Transcript of the proceedings on December 3, 1975.

Petitioner's motion to withdraw his plea of guilty was based upon several grounds, including the following:

1. That petitioner did not fully understand the nature of the charge against him at the time his plea of guilty was entered; (C.R.58) and

2. That the petitioner's plea of guilty was not voluntary, and was given under a misapprehension because of misrepresentations made to him by his prior counsel of record. (C.R.25)

After hearing, the Court found that the petitioner made his plea (of guilty) freely and voluntarily and with a full and clear understanding of the nature and consequences of his pleading guilty; (R.T.III 71) that the petitioner was properly advised by his counsel of record; (R.T.III 71) and that there was "no question but that the defendant knew exactly what he was doing." (R.T.III 71) The District

Court denied petitioner's motion to withdraw the plea of guilty (R.T.III 71-72) and on December 8, 1975, petitioner filed a Notice of Appeal. (C.T.68)

The United States Court of Appeals for the Ninth Circuit, by Order dated June 7, 1976, (App. A) affirmed the judgment of conviction, found adequate compliance with Rule 11, Fed. R. Crim. P., and found no abuse of discretion in refusing to permit the withdrawal of the plea of guilty.

The petitioner entered a plea of guilty to Count V of a nineteen count indictment which was filed against petitioner on August 6, 1975. (C.T. 1-20) Count one charged the petitioner with conspiracy to violate Title 8, U.S.C., Section 1324. (C.T.1) Counts two through seven charged petitioner with violation of 8 U.S.C., Section 1324(a) (4). (C.T.3-8) Counts eight through thirteen charged petitioner

with violation of 8 U.S.C., Section 1324(a) (3). (C.T.9-14) Counts fourteen through nineteen charged defendant with violation of 8 U.S.C., Section 1324(a) (2). (C.T. 15-20)

Count V of the indictment alleged that the defendant " ... willfully and knowingly encouraged and induced, and attempted to encourage and induce, the entry into the United States ... of ... an alien, who was not lawfully entitled to enter and reside within the United States, ... (C.T. 6)

The Reporter's Transcript of the proceedings on September 19, 1975, R.T.I) at which time the defendant's guilty plea was accepted by the court establishes the following:

1) At no time did the court personally address the defendant as to his understanding of the essential elements of the charge to which he pled guilty;

2) The court inquired generally of the defendant <u>on one occasion only</u> as to whether he understood the nature of the charge to which he was pleading guilty; (R.T.I 6)

3) During the proceedings on September 19, 1975, the court, or the court clerk, gave four different explanations of the nature of the charge to which the defendant was pleading guilty, to wit:

a) "Robert Maxwell Fenlon, do you now withdraw your former plea of not guilty to Count five of the indictment which charges you with smuggling an alien"; (R.T.I 3) (It was following this explanation that the defendant indicated he understood the nature of the charge.) (R.T.I 6)

b) "Robert Maxwell Fenlon, do you now withdraw your former plea of not guilty to Count five of the indictment which charges you with introducing the illegal entry of aliens?" (R.T.I 15)

c) "Count five of the indictment says that you knowingly encouraged and induced or attempted to encourage and induce Blanca Estela Ramos-Farrel, an alien, to enter and reside within this country." (R.T.I 20)

d) "You knew it was illegal to induce or to have anything to do with the bringing in of aliens into this country from Mexico, didn't you?" (R.T.I 21)

On the only occasion that the Court personally inquired of the defendant as to his understanding of the nature of the charge (R.T.I 6), the only explanation by the Court was that "count five of the indictment ... charges you with smuggling an alien."

The petitioner, at the hearing on December 3, 1975, testified that his prior counsel of record, E. Daniel DeAnda, did not fully explain the elements of the offense to petitioner, and further testified

that had he known the nature of the acts, and the degree of intent which are necessary elements of the offense, petitioner would not have pled guilty to the offense. (C.T. 61-62; R.T.III 4)

The petitioner further testified that Mr. DeAnda did not advise him as to what acts would have to be proved in order to sustain a finding of guilty to Count V, but that Mr. DeAnda only read Count V to him. (R.T.III 37)

Mr. DeAnda testified he had advised the petitioner fully as to the specific elements which were required to sustain a finding of guilty to Count V. (R.T.III 25) Mr. DeAnda stated he had advised petitioner as follows:

> "I talked to Mr. Fenlon and read this section to him, (Title 8, U.S.C., Section 1324(a) (4)) and told him that if the court and the jury believed that he knew--that he intended --that he had knowledge of encouraging and inducing the aliens of his--tried to help them enter this country, he would be found guilty of this particular charge." (R.T.III 26)

Mr. DeAnda further informed the petitioner that <u>any help</u> petitioner might give would be sufficient to make him guilty of that charge. (R.T.III 26)

Petitioner further testified at the hearing on December 3, 1975, that his plea was involuntary in that he did not knowingly and intelligently waive his right to confront and cross-examine the witnesses against him. (C.R. 35, R.T.III 5) The petitioner testified at length concerning the representations made to him by Mr. DeAnda prior to the entry of petitioner's guilty plea, and the fact that Mr. DeAnda informed petitioner that Mr. DeAnda had cross-examined the witnesses under oath on September 17, 1975, two days prior to petitioner's plea of guilty. (C.R.31-36; R.T. III 5) Rachel Hurtado testified that she was present on September 18, 1975, when Mr.

DeAnda informed petitioner that Mr. DeAnda had cross-examined, under oath, the material witnesses, on September 17, 1975, and that the material witnesses had testified against the petitioner. (C.R. 26-27; R.T. III 5)

Mr. DeAnda admitted having a conference with the petitioner on September 18, 1975, but denied telling petitioner that he had cross-examined the witnesses under oath. (R.T.III 31) Mr. DeAnda did testify that: "I think Mr. Fenlon misunderstood the word 'cross-examination' in his mind, even today, as far as in comparison to questioning." (R.T.III 32)

Mr. DeAnda stated to the District Court on at least two occasions that the defendant had no meritorious defense to Count V of the indictment. (R.T.III 7, 19) Mr. DeAnda testified that "we just picked one count at random" in deciding what count to which the defendant would enter a plea.

Mr. DeAnda further stated that he advised the petitioner to plead guilty to Count V because: "I think that's the Count Mr. Hoffman offered us". (R.T.III 30)

Mr. DeAnda was specifically asked if he considered with Mr. Fenlon whether the petitioner had a meritorious defense to that particular Count. Mr. DeAnda replied: "Well, I think that was part of the deal. If he (petitioner) pled guilty to this charge, he would drop all the other 18 counts." Mr. DeAnda evaded further inquiry into whether he discussed a meritorious defense as to Count V with the petitioner by stating:

> "My only answer to that question would be that the part of the plea bargain that was made with Mr. Hoffman was if Mr. Fenlon pled guilty to that particular Count, the other 18 counts would be dropped." (R.T.III 30)

The District Court denied petitioner's motion to withdraw his plea of guilty on December 3, 1976, and on December 4, 1976,

petitioner was sentenced to the custody of the Attorney General for two years. On June 7, 1976, the Ninth Circuit affirmed the conviction of petitioner (App. A) and on August 20, 1976 denied petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. The evidence is insufficient to support the finding of the Ninth Circuit that there was adequate compliance with Rule 11, Fed. R. Crim. P., by the District Court at the time defendant's plea was entered.

Rule 11, Fed. R. Crim. P., requires that the District Judge must address the defendant personally in open court and inform him of, and determine that he understands, the nature of the charge to which the plea is offered.

The record of the Rule 11 inquiry (R.T. I, supra pp. 9-11) as it relates

to the Court's duty to personally inform a defendant of the nature of the charge, and to personally determine that the defendant understands the nature of the charge conclusively establishes that:

A. The Court misadvised the defendant as to the nature of the charge. (R. T. I 3).

B. On the only occasion on which the Court inquired of the defendant as to his understanding of the nature of the charge, the Court had misadvised the defendant as to the nature of the charge, and had not corrected that mis-advice. (R. T. I 6).

United States v. Narvaez-Granillo, 119 F. Supp. 556, 560 (So. Dist. Cal. 1954) recognized that 8 U.S.C., Section 1324 requires different elements of proof for different subsections thereof.

The record of the proceedings on 19 September 1975, indicates, on its face,

that the accused, prior to stating that he understood the nature of the charge in response to the court's inquiry, was misinformed by the court that he was charged with "smuggling an alien". In fact, the defendant was not entering a plea of guilty to smuggling an alien, and further, the defendant was not charged in any count of the indictment with smuggling an alien. (C.T. 1-20).

2. The duty of the District Court, pursuant to Rule 11, Fed. R. Crim. P., which requires the Court to address the defendant personally in open court, and inform him of the nature of the charge to which the plea is offered, at the time the defendant's plea of guilty is entered, needs to be clarified.

Despite the facts set forth in paragraph 1. hereinabove, a distinguished panel of the Ninth Circuit has found adequate compliance with Rule 11, Fed. R.

Crim. P.

This Court has consistently held that the first and most universally recognized requirement of due process is real notice to the defendant of the true nature of the charge against him. Smith v. O'Grady, 312 U.S. 329, 334 (1940); Henderson v. Morgan, - U. S. -, 49 L. Ed. 2d 108, 114, decided June 17, 1976. This Court has also noted the importance of the proper construction of Rule 11 to the administration of criminal law in the federal courts. McCarthy v. United States, 394 U. S. 459, 463 (1968).

Recent cases decided in the United States Court of Appeals for the Third Circuit have concluded that Rule 11 requires the court to explain the meaning of the charge and what basic acts must be proved to establish guilt to the defendant.

"Recently this court has stated that in order to satisfy itself that the defendant actually does comprehend the charges

the court must explain the meaning of the charge and what basic acts must be proved to establish guilt." United States v. Cantor, 469 F. 2d 435, 438 (3d Cir. 1972), citing Woodward v. United States, 426 F. 2d 959, 962 (3d Cir. 1970).

"First, the court must satisfy itself that the defendant understands the nature of the charge. Routine questioning, or a single response by the defendant that he understands the charge, is insufficient. To satisfy itself that the defendant actually does comprehend the charges, the court must explain the meaning of the charge and what basic acts must be proved to establish guilt." United States v. Jasper, 481 Fed. 2d 976, 980 (3d Cir. 1973).

McCarthy v. United States, 394 U. S. 459 (1968) suggests that there are some cases in which personally addressing the defendant as to his understanding of the essential elements of the charge would seem to be required.

"20. The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and, therefore, we do not establish any guidelines other than those expressed in the Rule itself. As our discussion of the facts in this particular case suggests, however, where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a

determination that he understands the meaning of the charge. In all such inquiries, "(m)atters of reality, and not mere ritual, should be controlling." Kennedy v. United States, 397 F. 2d 16, 17 (C. A. 6th Cir. 1968)." McCarthy v. United States, 394 U. S. 549, F. N. 20 at 467 (1968).

It seems clear that Rule 11 requires, at a minimum, that the court correctly inform the defendant of the nature of the charge to which the defendant is entering a plea. In the instant case, the court' inquired generally of the defendant, on one occasion only, whether he had a full and clear understanding of the nature of the charge. (R. T. 6). This inquiry followed shortly after the defendant was misinformed by the court as to the nature of the charge. (R.T. 3). At no time prior to inquiring of the defendant as to his understanding did the court correct its prior misadvice. It is submitted that misadvice by the court as to the nature of the charge to which defendant is entering a plea of guilty is as significant an instance of non-compliance with Rule 11 as

if the court had offered no advice at all.

It is apparent that there is a significant conflict between the Ninth Circuit and the Third Circuit concerning the duty of the District Court in complying with the mandate of Rule 11 which requires the Court to inform the defendant of the nature of the charge to which the plea is offered. This conflict requires resolution.

3. Petitioner's plea of guilty was involuntary in that petitioner at no time intended to waive his constitutional right to confront and cross-examine the witnesses against him.

The District Court, prior to accepting petitioner's plea of guilty, did advise petitioner of his right to be confronted by and cross-examine all witnesses who accused him, and of the fact that petitioner would give up this right by pleading guilty. (R. T. I 17-18).

Petitioner testified (supra, pp 13-14;

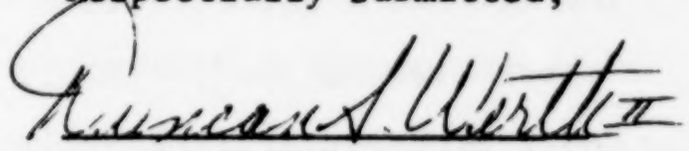
(C. R. 31-36; R. T. III 5) that he would not have plead guilty had he known his right to cross-examine the witnesses against him had not been exercised. His prior counsel had testified he thought the defendant misunderstood the word "cross-examination". (R. T. III 32). Under either situation it is clear that the witnesses were not cross-examined, and that petitioner, at the time his plea of guilty was entered, believed that his right to cross-examination had been previously exercised. Regardless of the "appearance" of voluntariness at the time of the entry of petitioner's plea of guilty, the record is clear that petitioner did not voluntarily waive his right to cross-examination, and therefore, did not voluntarily enter his plea of guilty.

CONCLUSION

For these reasons, the petitioner,

Robert Maxwell Fenlon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,



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September 16, 1976

APPENDIX

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. LOBERG MAXWELL FENLON, *Defendant-Appellant.*	No. 75-3734 ORDER AFFIRMING

[June 7, 1976]

On Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and WALLACE, Circuit Judges, and ANDERSON,* District Judge.

Judgment of conviction is affirmed.

We find adequate compliance with Rule 11, Fed. R. Crim. P.

Further, we find no abuse of discretion in refusing to permit the withdrawal of the plea of guilty.

*Honorable J. Blaine Anderson, United States District Judge for the DISTRict of Idaho, sitting by designation.

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APPENDIX B

FILED
Aug. 20 1976
Emil E. Melfi,Jr.
Clerk, U. S.
Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT MAXWELL FENLON, Defendant-Appellant.	No. 75-3734 ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS, WALLACE and ANDERSON, Circuit Judges.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

All active judges of the court have been notified of the suggestion for a rehearing in banc and none has voted for a rehearing in banc.

No. 76-403

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT MAXWELL FENLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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ROBERT MAXWELL FENLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of affirmance of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1976, and a petition for rehearing and suggestion of rehearing *en banc* were denied on August 20, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on September 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court complied with Rule 11, Fed. R. Crim. P., prior to accepting petitioner's plea of guilty.

2. Whether the district court abused its discretion in denying petitioner's motion to withdraw his plea of guilty.

STATEMENT

An indictment returned by a grand jury of the United States District Court for the Southern District of California in August 1975 charged petitioner with 19 counts of knowingly and willfully inducing the illegal entry of aliens into the United States, transporting such aliens within the United States, and harboring and concealing them from detection, in violation of 8 U.S.C. 1324(a)(2), (3), and (4), and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. On September 19, 1975, pursuant to a plea bargain whereby the remaining counts would be dismissed, petitioner pleaded guilty to count five of the indictment, which alleged that he willfully and knowingly encouraged and induced, and attempted to encourage and induce, the illegal entry of an alien into the United States, in violation of 8 U.S.C. 1324 (a)(4). Before accepting the plea, the district court explained to petitioner that by pleading guilty he would waive his right to trial by jury with the assistance of counsel, to confront and cross-examine witnesses and to summon witnesses in his own behalf, and his privilege against self-incrimination (Tr. 16-17).[1] The court also informed petitioner that the maximum penalty for the offense was five years' imprisonment and a fine of $2,000 (Tr. 17) and established that petitioner was pleading guilty not because of threats or promises but because he was guilty (Tr. 19).

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[1]"Tr." refers to the transcript of the guilty plea proceedings on September 19, 1975. "H. Tr." refers to the transcript of the December 3, 1975, evidentiary hearing on petitioner's motion to withdraw his plea.

The court then developed the factual basis for the plea by paraphrasing the charge (Tr. 20):

> This says that this count five of the indictment says that you knowingly encouraged and induced or attempted to encourage and induce Blanca Estella Ramos Farrel, an alien, to enter and reside within this country. Is that what you did?

The petitioner responded, "[y]es, your Honor," and proceeded to detail his knowing involvement in the illegal entry of Farrel into the country (Tr. 20-22). Finally, after petitioner's counsel stated that he believed that petitioner was pleading guilty voluntarily and with an understanding of the charge (Tr. 22-23), the court accepted the plea.

On November 17, 1975, the date that had been set for sentencing, petitioner filed a motion to withdraw his guilty plea. Following an evidentiary hearing on December 3, 1975, at which petitioner, his former counsel, and the probation officer testified, the court denied the motion, finding that the plea had been entered "freely and voluntarily and with a full and clear understanding of the nature of the consequences of * * * pleading guilty" and that the government would be prejudiced by withdrawal of the plea (H. Tr. 70-71). On the next day petitioner was sentenced to two years' imprisonment. The court of appeals affirmed in an unpublished order, holding that the district court had adequately complied with Rule 11, Fed. R. Crim. P., and did not abuse its discretion in refusing to permit withdrawal of the plea of guilty (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 16-18) that the district court did not comply with Rule 11, Fed. R. Crim. P., because the record fails to show that petitioner was

informed of and understood the nature of the crime to which he pleaded guilty. As outlined above, however, the court expressly stated that petitioner was charged in count five with knowingly inducing or attempting to induce Blanca Estella Ramos Farrel, an alien, to enter and reside in this country illegally. Petitioner's admission, under oath (Tr. 16), of the facts underlying that charge clearly demonstrated that he understood the nature of the crime and that he intentionally committed the offense.

Petitioner correctly notes that, at a separate morning session on the day of petitioner's guilty plea (Tr. 6)[2] and subsequent to reading the charge to petitioner and establishing a factual basis for the plea (Tr. 21), the trial judge expressed the substance of count five with imprecision. These statements, however, when read in the context of the complete Rule 11 proceeding, do not indicate that petitioner was misled as to the crime to which he was pleading guilty. Indeed, at the completion of the proceeding, petitioner's attorney expressly reaffirmed that petitioner was "pleading guilty freely and voluntarily and with a full and clear understanding of the nature of the charge against him and the consequences of his guilty plea" (Tr. 22-23). The district's court's fact finding to that effect, reached after a full evidentiary hearing, does not warrant further review.

2. Petitioner claims (Pet. 18-22) that there is a need for further clarification of the district court's duty when accepting a plea of guilty. But even if such additional

[2]At a proceeding held on the morning of September 19, 1975, the district court refused to accept petitioner's plea of guilty because of his misunderstanding of the terms of the plea bargain and the consequences of the plea (Tr. 8-12). After an adjournment, petitioner pleaded guilty on the afternoon of that day.

guidance were necessary, this case would be an inappropriate vehicle, since it was decided under a version of Rule 11 that is no longer in effect.[3] In *McCarthy* v. *United States*, 394 U.S. 459, 467-468, n. 20, this Court declined to establish any guidelines under the old version of Rule 11 other than those set forth in the Rule itself and indicated a preference for a case by case determination in which "[m]atters of reality, and not mere ritual, should be controlling." Here, as we have previously noted, the record leaves no doubt that petitioner's guilty plea was voluntary and was the product of his complete understanding of all material facts.[4]

3. Petitioner contends (Pet. 22-23) that his plea of guilty was not entered knowingly because he was not advised that the plea would waive his right to cross-examine the witnesses against him. Before accepting the plea, however, the court twice advised petitioner of his right to confront and cross-examine the government's witness (Tr. 4-5, 16-18) and that he would give up

[3]Effective December 1, 1975, Rule 11 has been amended to require a more detailed interrogation of a defendant who wishes to plead guilty.

[4]Relying primarily on *United States* v. *Jasper*, 481 F. 2d 976 (C.A. 3), petitioner contends that there is a conflict between the decision below and decisions of the Third Circuit in the standards applied to determine the adequacy of a Rule 11 inquiry into a defendant's understanding of the nature of the charges against him. In *Jasper*, however, the defendant pleaded guilty to three counts of violating separate subsections of 18 U.S.C. 2113, and the district court's inquiry into both the nature of the charges and the factual basis of the separate offenses was represented by a single question: "Are you pleading guilty because of your guilt, and for no other reason?" 481 F. 2d at 981. The extensive colloquy in this case stands in marked contrast to the "[r]outine questioning or a single response by the defendant that he understands the charge," which the court of appeals criticized in *Jasper* (481 F. 2d at 980).

these rights by pleading guilty. In view of this record, the court was not required to accept the testimony of petitioner and his former attorney that petitioner may have misunderstood the term "cross-examination" (H. Tr. 38-39). See *United States* v. *Webster*, 468 F. 2d 769 (C.A. 9); *United States* v. *Fernandez*, 428 F. 2d 578 (C.A. 2).[5]

[5]Although presentence motions under Rule 32(d), Fed. R. Crim. P., are viewed liberally (see, *e.g.*, *Kadwell* v. *United States*, 315 F. 2d 667 (C.A. 9)), a defendant has no absolute right to withdraw a plea of guilty and bears the burden of showing that it would be "fair and just" to permit him to do so. See *Kercheval* v. *United States*, 274 U.S. 220, 224; *United States* v. *Lombardozzi*, 436 F. 2d 878 (C.A. 2), certiorari denied, 402 U.S. 908. Whether to allow withdrawal of a guilty plea is a question committed to the sound judgment of the district court, whose decision will not be reversed absent an abuse of discretion. *United States* v. *Barker*, 514 F. 2d 208 (C.A. D.C.), certiorari denied, 421 U.S. 1013; *United States* v. *Lombardozzi*, *supra*, 436 F. 2d at 881.

Petitioner has not offered any reasons sufficient to disturb the district court's findings that his plea was voluntary and that withdrawal of the plea would not be fair and just. In this regard, the court properly noted that withdrawal of petitioner's plea would seriously prejudice the government because its material witnesses, all of whom were aliens who had illegally entered the country, had been returned to Mexico following the plea (H. Tr. 71). See *United States* v. *Barker*, *supra*, 514 F. 2d at 222; *United States* v. *Vasquez-Velasco*, 471 F. 2d 294 (C.A. 9), certiorari denied, 411 U.S. 970.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

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